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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., AIR TRANSPORT ASSOCIATION OF AMERICA, AIRCRAFT OWNERS AND PILOTS ASSOCIATION, BRANIFF AIRWAYS, INC., HEART O'WISCONSIN BROADCASTERS, INC., DAVID INGLE, JR., LAKE CENTRAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, AND FEDERAL COMMUNICATIONS COMMISSION, *Respondents*,

AMERICAN TRUCKING ASSOCIATION, INC., NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN MERCHANT MARINE INSTITUTE, INC., AND AMERICAN RADIO RELAY LEAGUE, INC., *Intervenors*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals entered July 10, 1964 (Appendix A, *infra*, pp. 1a-12a) is reported at 335 F. 2d 304. The FCC's Report and Order of May 8, 1963 and its Memorandum Opinion and Order of

October 7, 1963 (R. 140-172, 202-225)[1] are reported at 34 F.C.C. 811 and 28 F.R. 10911.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra,* pp. 13a-15a), styled "Decree," was entered on August 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Title V of the Independent Offices Appropriation Act of 1952, (5 U.S.C. § 140, 65 Stat. 290), approved August 31, 1951,[2] expresses the "sense of the Congress" that a wide variety of activities of all federal agencies should be "self-sustaining to the full extent possible" and purports to authorize the "head of each federal agency" to prescribe "such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable" for any activity falling within the broad scope of the statute, "taking into consideration" certain specified factors and "other pertinent facts," with all collections to be "paid into the Treasury as miscellaneous receipts." FCC Regulations, 47 C.F.R. § 1.1101-1.1119,[3] impose charges on the filing of applications for radio licenses, permits and certificates of public convenience or necessity. The question presented is whether said Section 140, the appropriation act rider, together with FCC regulations, Section

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[1] "R." refers to Petitioners' Appendix in the Court of Appeals.

[2] "Section 140" is used as a short designation for Title V, a "Fees and Charges" rider to the Independent Offices Appropriation Act of 1952, 5 U.S.C. § 140. Unless otherwise indicated, all emphasis herein is supplied.

[3] Originally numbered § 1.600 et seq.

1.1101 through 1.1119, are constitutionally effective as valid legislative authority for the FCC's imposition of charges against petitioners for the filing of applications for radio licenses.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 5 U.S.C. § 140, 65 Stat. 290 (August 31, 1951), reads as follows:

> "TITLE V—FEES AND CHARGES
>
> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, assocations, organizations, partnerships, corporations or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing con-

tained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount or directing the disposition of any fee, charge, or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. Aug. 31, 1951, c. 376, Title V, § 501, 65 Stat. 290."

STATEMENT

Petitioner Aeronautical Radio, Inc. (ARINC), a corporation operated not for profit and engaged in rendering radio communication service to the nation's airlines for the safety and convenience of their operations, is required by the Communications Act of 1934, 47 U.S.C. § 301 et. seq., to obtain licenses and license renewals from the FCC in order to continue its operations. Other petitioners (or the members of petitioner associations) are similarly required by the Communications Act to obtain and maintain FCC licenses. The airline petitioners are required by the CAB and FAA to have FCC licensed airborne radio stations in order to engage in public air transportation.

In February, 1962, by a 4-3 vote, the FCC instituted a rule making proceeding in Docket 14507, looking toward the establishment of a comprehensive schedule of filing fees to accompany all applications for licenses, certificates, and permits which it issues (R. 3-9). As authority for this proposal, the FCC majority cited Section 140 (R. 3, 8).

Although the FCC invited written comments on its fee proposals, it did not permit oral argument or hold

a hearing, although requested to do so by ARINC (R. 66). "The vast majority" of the written comments received "were in opposition to the proposed schedule of fees" (R. 142). Despite this opposition, and the questionable statutory foundation, the FCC, with two Commissioners strongly dissenting, adopted a schedule of fees. (R. 140-172). Petitions for Rehearing were filed by certain petitioners and others (R. 173-193), which the FCC, by a divided vote, rejected in its Memorandum Opinion and Order (R. 202-225).[4]

As finally approved by the Commission, fees are required to accompany each application for most of the licenses, permits, etc., issued by the FCC. "All fees collected will be paid into the United States Treasury as miscellaneous receipts" and "will be charged irrespective of the Commission's disposition of the application." (47 C.F.R. § 1.1103(b), (d), R. 218).

Under this initial FCC fee schedule, ARINC will thus be forced to pay more than $10,000 annually into the United States Treasury in order to carry on its airlines communications business. Other petitioners will be similarly affected in varying degrees.

These petitioners appealed and the Court below upheld the FCC's action in all respects. The Court first considered, independently, whether Section 140 was a constitutionally valid delegation of legislative power, and it found that Section 140 complied with the constitutional essentials as set forth in *Yakus* v. *United States,* 321 U.S. 414 (1944). The Court next considered, independently, whether the Commission's rule making action imposing charges was valid, and it con-

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[4] A more complete discussion of the FCC opinions is contained in Appendix C, *infra,* pp. 18a-20a.

cluded that the FCC's regulations were not arbitrary or lacking in authority, despite an admitted disparity between Broadcast fees, which recover only 8% of applicable costs, and Safety and Special Service fees, which recover 72%.

REASONS FOR GRANTING THE WRIT

Under Section 140 and the FCC's rule making action, the long standing rights of petitioners under the Communications Act of 1934, as amended,[5] to obtain radio station licenses or permits, which are essential to the conduct of their operations, have now been modified, without any amendment to the FCC's charter statute, by the imposition of charges upon the filing of FCC applications. Petitioners contend that Section 140 and the agency's rule making action, considered together, and in light of a combination of delinquencies relating to both, constitute an ineffective legislative base for the imposition of charges against them.

Section 140 is unprecedented in the government-wide sweep of its delegation to all agencies of government. It is unprecedented by reason of the revenue raising nature of the delegation. It is unprecedented as an indirect amendment of all charter statutes of federal agencies. The grant of such broad power to the agencies in the casual manner of a discredited legislative rider to a 13-year old appropriation act is unprecedented. Section 140 is unprecedented by the absence of any provision for protesting the imposition of a levy or obtaining any refund or other procedure. The FCC's rule making action is unprecedented as the first effort of any federal agency over the intervening 13-year period to impose a comprehensive schedule of

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[5] 47 U.S.C. § 301 et. seq.

charges under Section 140 for the purpose of making its total regulatory activities partially self-sustaining. Section 140 and the FCC's rule making action, considered together, are unprecedented extremes in the maximum of delegation with a minimum of legislative consideration; and in the maximum of agency discretion with no procedural safeguard.

A consideration of Section 140 and the FCC's rule making action reveals an inversion of the legislative process. It was the FCC, not the Congress, which determined that charges would be imposed. The FCC, not Congress, decided to impose charges on the filing of applications, *not* on the granting of licenses or permits. The FCC, not Congress, decided who and what would be subject to charges and who and what would be exempt. The FCC, not Congress, determined the amount of charges to be levied. The FCC, not Congress, decided that charges for the filing of applications in the broadcasting service would be "nominal," but self-sustaining, or nearly so, in the safety and special radio services. It was the FCC, not Congress, which decided to levy flat charges rather than cost-related fees. The FCC, under the Court of Appeals opinion, may now legislate the imposition of new charges in any amount or for any purpose. Indeed, the FCC, with such uncontrolled discretion, is made a government unto itself in the matter of imposing charges.

The Court, in its opinion below, acknowledged that petitioners' challenge to the validity of Section 140, and the FCC's rule making action, was based on a "combination of factors." (App. A *infra,* p. 3a). But the Court, nevertheless, proceeded with a fragmented consideration, first, of the validity of Section

140 viewed as a normal delegation of regulatory power considered independently and in the abstract, and, second, with a consideration of the FCC's rule making action, considered independently and viewed as in conformity with a fully competent legislative enactment. In this fragmented consideration of the case, the Court below disregarded the multiple defects asserted by petitioners and showed no appreciation of the synergistic effect of the combination of delinquencies in Section 140 and the FCC's rule making action.[6] The opinion of the Court below reveals no awareness of the unprecedented nature and scope of the issues presented in this case, and it failed to make any distinction between this untoward delegation[7] of power for the purpose of raising revenue and the usual delegation of regulatory powers in regulatory statutes subject to proceedings before agencies and opportunity for judicial review.[8]

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[6] Cf. Mr. Justice Cardozo in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 319 (1932) ("The tokens of intention set down in this opinion have a force in combination that is denied to any one of them standing alone."); cf. also *Interstate Broadcasting Co.* v. *FCC*, 285 F. 2d 270, 272 (D.C. Cir. 1960).

[7] If Section 140 is not a case of "delegation running riot," it would be difficult to imagine such a case. See Mr. Justice Cardozo, concurring, *Schechter* v. *United States*, 295 U.S. 495, 553 (1935).

[8] The *Yakus* case, 321 U.S. 414 (1944), which the Court below principally relied upon, far from being a parallel with the instant proceeding, is actually a study in contrast. The Emergency Price Control Act and Inflation Control Act, under consideration in the *Yakus* case, were the products of fully considered legislation by responsible legislative Committees of the House and Senate on Banking and Currency, not a superficially considered legislative rider to an appropriation act. The delegation was to a single agency for a single purpose—the fixing of maximum prices—not a blunderbuss delegation to all agencies of government to impose charges, if they chose, on a variety of different activities. The Emergency Price Control Act, unlike Section 140, expressly provided for a

The problem of authorizing the imposition of charges by agencies is one which has been of active concern to the various Committees of the Congress for more than a decade. One aspect of this problem has to do with the distinction between proprietary and regulatory functions and the distinction between services of a private benefit nature in contrast to functions fundamentally governmental in character. Studies by various Committees of the Congress, as shown by Part 1 of Appendix C, have concluded that this problem is one which should be dealt with on an individual agency basis by the several legislative Committees of the Congress. The single exception to this policy is the 1951 action of the House Subcommittee on the Independent Offices Appropriation Act which reported out the "Fees and Charges" rider. That action was in violation of the rules and organization of the House and of the Senate, and in conflict with one of the main purposes of the Legislative Reorganization Act of 1946, 60 Stat. 812 (1946). In this instance, it was a gross circumvention of the regular legislative process. (House Rule XXI, § 2; Senate Rule XVI, §§ 2, 4).

The efforts by the Congress to outlaw the appropriation act rider abuse are detailed in Part 3 of Ap-

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hearing before the Price Administrator upon a protest to any maximum price regulation with a right to contest the agency's regulation and to obtain judicial review of that determination. Indeed, this due process provision was a key element in saving the delegation in the *Yakus* case. The opinion of the Court below showed no awareness that the specification of procedural safeguards is an essential feature in the permissibility of a delegation of authority to deprive persons of their rights or property. The omission from Section 140 of any right to protest the levy of a charge or to obtain a refund, or to be heard, on the agency's application of its levy in any particular case, is a fatal defect in the instant delegation.

pendix C. Experience has shown that the most formal efforts by the Congress to eliminate this abuse have proved ineffective. This is demonstrated by the enactment of Section 140 which far and away exceeds anything which has ever been attempted by a legislative rider to an appropriation act.[9] The versatility of the rider device is illustrated by the rider attached to the Supplemental Appropriation Act of 1951 for the purpose of rendering ineffective this Court's decision in *Wong Sang Sung* v. *McGrath*, 339 U.S. 33 (1950). See *Roccaforte* v. *Mulcahey*, 169 F. Supp. 360, 362-3 (D. Mass. 1958). When the rider device is used for comprehensive legislation such as Section 140, all opportunity for careful or responsible consideration of its import is lost, with the result that the performance of legislative functions is simply abdicated, and citizens are deprived of any opportunity to participate in the legislative process.[10]

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[9] *United States* v. *Dickerson*, 310 U.S. 554, 555-6 (1940) was decided before enactment of the Legislative Reorganization Act. Moreover, *Dickerson*, and the cases on which it relied, involved true "economy limitations", permitted under applicable Congressional rules, rather than substantive legislation granting new and sweeping revenue raising authority.

[10] The validity of the rules of the House and of the Senate is not at issue here, but rather the legal effect of their nonobservance and violation in this particular instance. The nonobservance of a House or Senate Rule is a justiciable issue. *United States* v. *Ballin*, 144 U.S. 1 (1892); *United States* v. *Smith*, 286 U.S. 6 (1932). Under the Legislative Reorganization Act, legislative powers are distributed among the various standing Committees, excluding the Appropriations Committees, and the rules of both houses prohibit the inclusion of any provision in appropriation bills "proposing new or general legislation" or "changing existing law". This is not merely a rule of procedure or internal convenience. Congress, by enacting the Legislative Reorganization Act of 1946, has done all that is practical for the legislative branch to do to eliminate the appropriation rider abuse, the most extreme example of which is

The FCC's rule making action demonstrates that all significant legislative-type determinations were left open-ended by Section 140. (R. 3-7; 140-164; 202-217). The FCC's action reveals also a disregard of key provisions of Section 140, and a disposition by the FCC to proceed on its own whether within or beyond the provisions of Section 140. In part, this is a reflection on the ambiguity, vagueness and incompleteness of the statute.

The things enumerated in Section 140 include "license, permit certificate," and the verbs used include "granted" and "issued." Nevertheless, the FCC chose to disregard these provisions and determined instead to levy charges on the mere filing of applications, regardless of whether acted upon or granted. But Section 140 contains no provision authorizing the imposition of charges on applications for any of the things listed.

The statute states an objective of making those things enumerated "self-sustaining to the full extent possible." But the FCC elected, at least in its initial action, to impose charges only at a level which would return to the government something less than 25% of the FCC's annual budget.

Section 140. Fullfillment of this intention of the Congress to set its own house in order is being obstructed by decisions of lower courts in reliance on the rule in the *Dickerson* case, 310 U.S. 554, without any consideration of the supervening enactment of the Legislative Reorganization Act, as for example in the opinion of the court below and in the *Roccaforte* case, *supra*. A reconsideration of the rule in the *Dickerson* case is warranted if the expressed intention of the Congress is to be realized. The nature of the legislative rider abuse is such that its effective elimination requires action by the judicial branch. Cf. *Baker* v. *Carr*, 369 U.S 186 (1962).

With respect to the provisions on "cost to the Government" and "value to the recipient," the FCC, at least with respect to the Broadcast services, conceded that its charges "do not accurately reflect cost to the government," or "the value conferred upon a recipient of a license." (R. 149). Instend, the FCC states, "The fees adopted herein resolve this dilemma by establishing flat charges. The Commission believes the flat fees to be a reasonable compromise because they are nominal." (ibid). Section 140, however, does not use the term "flat charges," or "nominal charges."

In the case of the numerous Safety and Special Radio Services, the FCC characterized its charges as "nominal," but it observed, "The net result is that the total fees to be collected bear a fair relationship to the cost of administering the Safety and Special Radio Services." (R. 152). Thus, the FCC, in the same rule making action under the same statute, conceded that its charges in the case of the Broadcasting services were not cost-related, whereas in the case of the Safety and Special Radio Services they were deemed cost-related. Whatever cost studies may have been made by the FCC in this matter, they were not made a part of the record, nor were they made available to the parties participating in the rule making proceeding.

Another illustration is the FCC's disregard of the statutory provision "fair and equitable" as between charges for the Broadcast class of applications and those in the Safety and Special Radio Services. It was revealed for the first time in Respondents' brief, filed with the Court below on April 11, 1964, that the FCC, in 1961, had made a cost study of operations in

"its major areas of responsibility."[11] This study essentially confirmed the facts which were presented to the Court below by petitioners and intervenors, namely that there was an inequitable disparity in the revenues to be derived from applications of the Broadcast services as contrasted to the revenues to be derived from applications in Safety and Special Radio Services. These facts established that the charges levied on applications in the Broadcasting services were so nominal that they would gross only 8% of the cost of administering the broadcast services, whereas the charges levied on applications on the Safety and Special Radio Services would yield 72%. This gross disparity, which is confirmed in the opinion of the Court below (App. A. *infra*, pp. 10a-11a), surprisingly was not considered by it to transgress the "fair and equitable" provision of the statute.[12]

Approval of such a breadth of discretion over matters legislative in nature as exercised in the FCC's rule making action now confirms in the FCC, and for that matter in other agencies of government, complete and total discretion over the imposition of charges in any amount for any reason, notwithstanding the absence of any provision on procedural rights. Indeed,

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[11] The FCC, so far as known, did not ascertain the cost of processing applications, e.g. in the aviation service, or ascertain the cost difference in processing applications for new stations in contrast to routine license renewals, the charges for which are the same. The FCC does not know whether its charges in some instances are in excess of processing costs.

[12] Indeed, under the holding below, the FCC, if it chose, could revise its charges so that 72% or more of the costs of Broadcast application processing would be recovered and 8% or less of those in the Safety and Special Radio Services. If the same criteria were followed in both classes, the charge on broadcasting applications would have to be increased tenfold. Appendix C *infra*, p. 20a.

the opinion of the Court below is without limitation or qualification in upholding not only Section 140, but even a broader sweep of agency discretion transcending its vague provisions.

CONCLUSION

This is a case of first importance directly to the FCC and all persons subject to its regulation, and indirectly to all other agencies in the executive and independent establishments and persons subject to their regulation. At issue here is the first action that any federal agency, without express authorization of the Congress, has taken to levy charges on persons regulated to offset agency expenditures for performing governmental regulatory functions. The introduction of such a radical departure into the federal regulatory systems, predicated solely on the claimed authority of Section 140, poses the above stated novel and important questions which should be considered and determined by this Court.

Respectfully submitted,

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October 21, 1964

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1963

APRIL SESSION, 1964

No. 14419

AERONAUTICAL RADIO, INC., AIR TRANSPORT ASSOCIATION OF AMERICA, AIRCRAFT OWNERS AND PILOTS ASSOCIATION, BRANIFF AIRWAYS, INCORPORATED, HEART O' WISCONSIN BROADCASTERS, INC., DAVID INGLE, JR., LAKE CENTRAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., NORTHWEST AIRLINES, INC., UNITED AIR LINES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,*

AMERICAN TRUCKING ASSOCIATIONS, INC., NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN MERCHANT MARINE INSTITUTE, INC., AMERICAN RADIO RELAY LEAGUE, INCORPORATED, *Intervenors.*

Joint Petition to Review and Set Aside an Order of the Federal Communications Commission

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July 10, 1964

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* The issues raised by this joint petition to review[1] an order[2] of the Federal Communications Commission establishing a comprehensive schedule of license fees are: I. whether the Order is based on an unconstitutional and invalid delegation of legislative power; and II. whether, if constitutional, the power was exercised in such manner as to render the schedule void. We decide the issues in favor of the Commission.

The schedule under review was ordered by the Commission October 7, 1963, effective January 1, 1964,[3] prescribing fees for applications for licenses to use the public air waves for radio purposes. The Commission acted under authority of Title V of the Independent Authorization Act of 1952. 65 Stat. 290 (1951), 5 U.S.C. § 140. It is § 140, a rider to the Act, which is assailed as an unconstitutional grant of legislative power.

The substance of § 140 is a declaration of the "sense of the Congress that any * * * service, * * * license, * * * or similar thing of value * * * provided * * * by any Federal agency * * * except those engaged in the transaction of the official business of the Government, shall be self-sustain-

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[1] Pursuant to § 402(a) of the Communications Act, as amended, 47 U.S.C. § 402(a), and the Judicial Review Act of 1950, 5 U.S.C. §§ 1031, *et seq.*

[2] Petitioners seek review of a Report and Order of the Commission (28 Fed. Reg. 4658), issued May 6, 1963, establishing the schedule of filing fees, and a Memorandum Opinion and Order (28 Fed. Reg. 10911), issued October 7, 1963, effecting several changes in the fee schedule in response to petitions for reconsideration.

[3] This court, on December 31, 1963, granted a temporary injunction staying the effect of the Order. 5 U.S.C. § 1039(b). On February 13, 1964, the injunction was dissolved. The Commission began collecting fees, March 17, 1964, the moneys collected going to a special Treasury Fund established pursuant to this court's order dissolving the temporary injunction.

ing to the full extent possible, and the head of each Federal Agency is authorized by regulation (which, * * * in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe * * * such fee * * * as he shall determine * * * to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *."

I.

Petitioners contend that § 140 is an unconstitutional delegation of legislative power because of a "combination" of factors: it was addressed to all agencies and not to a specific high-level administrator; the subject matter of the legislation belies the possibility of a basic policy determination by Congress; the agency head has the "uncontrolled option" whether or not to prescribe fees; and the standards set forth in the statute are not only diverse, but are so conflicting and inconsistent that they cannot be used to place limits on the administrative discretion. In our opinion none of these factors with regard to the statute before us constitutes an unconstitutional abdication of legislative power, and we do not see how their "combination" puts § 140 "beyond the pale of constitutionality" as petitioners contend.

The constitutional essentials for determining whether an act of Congress constitutes an invalid delegation of power are set forth in *Yakus* v. *United States*, 321 U.S. 414 (1944). There the Supreme Court held constitutional the Emergency Price Control Act of 1942 which fixed prices during World War II. The Court found that Congress had stated the legislative objective, the method of achievement, and the guiding standards for the administrator. The guides were requirement of fairness and equity with due consideration "so far as practicable" to

the prices prevailing in a designated base period. The Court said, "Only if we could say there is an absence of standards for the guidance of the Administrator's action so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed would we be justified in overriding the choice of means for effecting the declared purpose." 321 U.S. at 426.

The constitutional essentials are not absent here. The Congressional objective is that agencies issuing "license and the like" shall be self-sustaining "to the full extent possible." The method prescribed is fees "uniform as practicable." The guides are fairness and equity "taking into consideration direct and indirect cost to the Government, value to the recipient, [and] public policy or interest to be served." And in the proper proceeding this court can determine, as will be seen hereafter, that the Order is consistent with Congressional policy.

A reading of the Commission's Report and Order is sufficient to answer the claim that § 140 is too vague, and the criteria meaningless, as applied to petitioners and intervenors. Certainly the Commission could, without difficulty, know what Congress' goal was; the boundaries of the means to be used are plain and were, we think, applied by the Commission in a knowledgeable way. *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). The standard of "fair and equitable" is a commonplace standard in our jurisprudence, and is sufficient in the area of the Commission's sphere of power as the standard of "public convenience and necessity" approved in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), or the various instances mentioned in *Yakus* at pages 426-27. The Congressional ground rules are clear enough to limit the Commission, and, if more specific, Congress might have thought, would have been too narrow to embrace all federal agencies.

Because § 140 is merely permissive in nature, rather than mandatory, or contingent upon a prerequisite find-

ing, does not mean that it is an unconstitutional abdication of legislative functions. In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 415 (1943), the Court invalidated § 9(c) of the NIRA because it delegated to the "President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he * * * [saw] fit * * * [with] disobedience to his order * * * a crime punishable by fine and imprisonment." It is true that in cases following *Panama Refining*, all upholding legislative delegation, Congress made prerequisite an administrative finding before the agency was empowered to use the delegated powers.[4]

We do not believe the lack of a specific prerequisite renders § 140, which is addressed to *all* federal agencies, each formed for a different purpose, fatally defective. The "self-sustaining" purpose of § 140 must be weighed against the purpose for which each of the many agencies was established. Therefore, as a prerequisite to a fee schedule, each agency must weigh the policy of making its services "self-sustaining" against the public policy considerations for which it was formed, and upon this determine whether or not to establish a fee schedule. This is what the FCC has stated it has done with respect to the schedule before us: "[O]ur determination [is] that the establishment of a fair and equitable schedule would be in the public interest under the Communications Act of 1934." The Communications Act, against which the purpose to be served by the delegation may be weighed, makes the present case distinguishable from *Panama Refining*, because it provides a general policy[4a] in the light of which the Commission can determine if and when, a fee schedule is needed.

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[4] See, *e.g.*, *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 397 (1940), *Yakus* v. *United States*, 321 U.S. 414, 420 (1944), and *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 607 (note 3) (1950).

[4a] See, *e.g.*, 47 U.S.C. §§ 151, 303(g) (1962).

Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935), does not apply. There the Court struck down the NIRA because Congress established no standards but sought to authorize the President to do so without any guidelines.

We see no merit in the contention that the agencies to whom the power is delegated should have been specified, because we think they were identified sufficiently to indicate the Congressional purpose. And we see no merit to the contention that § 140 was enacted as a rider to an appropriation bill in violation of the Legistlative Reorganization Act of 1946, 60 Stat. 812, 821, and the Standing Rules of the House and Senate. The Act of 1946 adopted only as a Senate Rule a prohibition against amendments introducing new or general legislation to appropriation bills; § 140 was not an amendment. And despite the Senate and House rules, § 140 was adopted. Also despite criticisms from many sources, for varied reasons, since its adoption in 1952, § 140 has remained in effect.

We hold § 140 of Title V is not an unconstitutional grant of legislative power.

II.

The claim is made that the Commission's schedule was drawn arbitrarily, or that the Commission exceeded the statutory authority or disregarded the statutory guidelines.

The schedule[5] itself was broken down into three categories: Broadcast Services, including AM, FM, and television broadcast stations, with fees for new stations rang-

[5] The fee schedule is published at 47 C.F.R. § 1.1101 *et seq.* (1964).

ing from $50.00 to $100.00,[6] Safety and Special Radio Services, including non-broadcast users of radios—other than common carriers, amateur aviation, marine and citizens—with application fees ranging from $4.00 to $30.00;[7] and Common Carrier Services, with fees ranging from $5.00 to $100.00.[8] There were several exclusions from the schedule, such as police, fire and other governmental users of radio; users on a non-profit basis essentially for public health, safety and welfare; and educational, hospital, disaster relief organizations and like users.

The Commission released its initial notice of rule making[9] and invited comments from those affected. It issued a Report and Order[10] adopting a schedule of fees, having made changes in the proposed fees in response to 900 formal comments, and many letters. Its Memorandum Opinion and Order October 7, 1963,[11] further modified the schedule in response to petitions for reconsideration. By inviting and considering the comments and petitions for resonsideration before putting the order into effect, the

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[6] The fee for a three year television license is $100; for a radio license (AM and FM), $50.

[7] The fee for a five year amateur radio license is $4; in the Citizens Radio Service, $10 and $8; for Fixed Microwave Radio Stations, $30.

[8] The fee, for example, for Mobil Radio Service Base Stations is $100; and for a five year license in the Aviation Services, $10.

[9] The notice of proposed rule making was issued February 16, 1962, and published at 27 Fed. Reg. 1729.

[10] The Report and Order was issued May 8, 1962 [sic], and published at 28 Fed. Reg. 4658.

[11] The Memorandum Opinion and Order are published at 28 Fed. Reg. 10911.

Commission fully complied with § 4(b) of the Administrative Procedure Act.[12]

The point, that the fees scheduled are filing fees to be paid before any Commission service is rendered and that filing fees are unauthorized under § 140, was not raised before the Commission, and we therefore need not pass on it. *Albertson* v. *FCC*, 243 F.2d 209, 211 (D.C. Cir. 1957); § 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405. We do not agree with petitioners that it is a jurisdictional point and that therefore it is irrelevant whether the point was raised below.

To sustain their contention that the schedule does not comply with the statutory guidelines as to the cost to government, value to the recipient, and public interest served, petitioners must show us that the order assailed is unreasonable or arbitrary: we are not at liberty to interfere with the discretion of the Commission. *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 236-37 (1936). The weighing of these statutory factors or "whether all * * * must play a quantitative share" in the judgment made, was for the Commission. *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 611, 612 (1950).

Petitioners erroneously imply that the Commission had the *burden* of demonstrating that it took into consideration "the direct and indirect cost to the Government," as required by § 140. The burden is on petitioner to show unfairness. We think petitioners ask too much in claiming

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[12] § 4(b) of the Administrative Procedure Act provides in pertinent part that "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b).

the identification of Commission function and costs with respect to each of the over 500,000 yearly applicants. The general terms are sufficient to inform applicants what services are rendered in considering applications for licenses for use of radio in the various categories. In its Report and Order in discussing Broadcast Services, the Commission candidly conceded that "as flat fees, the charges do not accurately reflect cost * * * of processing a particular application or the value conferred upon the recipient." An AM operation in a town of 2,000 people, for example, would involve "complex interference questions requiring extensive processing," while an application for a large market VHF television facility could require little technical processing, although the income value to the licensee would be considerably more. We think this is a good illustration of the Commission's difficulty and sufficient answer to petitioners' contention that there is no rational basis, fairness, equity or uniformity, in charging the same fee for applications which require a hearing and for those which do not.

We think also the Commission's discussion and reasoning in its Report and Order under Safety and Special Radio Services is a complete answer to the contention that the Commission ignored the "value to the recipient" factor and did not attempt to demonstrate benefits to applicants nor relate fees to benefits. It seems quite obvious to us that in view of the number of applicants, petitioners are seeking a most unrealistic performance by the Commission and again erroneously imply that the burden is upon the Commission to justify its fee schedule.

Petitioners argue the Commission's failure to "perceive" that petitioners' licenses benefited primarily the public rather than the licensee, disregarded the "public interest served" factor. We refer again to the Commission's Report and Order under its heading "General" where the Commission weighed special benefit and public interest, and the effect on public interest of discouragement in use

of radio because of fees. Further discussion of the problem is shown under Safety and Special Radio Services. And we think the care displayed in adjusting fees, after comments and objections from licensees, in the light of the "public interest" criterion compels the conclusion that there is no merit to petitioners' claims.

The Commission had to start somewhere in framing its schedule. It started with its 1961 cost study and has stated frankly that it must continue to study the schedule for unfairness or inequality.

Intervenor American Merchant Marine, Inc., argues that maritime users should be exempted from fees because their use of radios is required by law, or for services which are primarily in the public interest, and that because of the maritime industry's declining economic status, fee charges would be in conflict with the government policy of subsidizing the maritime industry and would render the status of non-subsidized ships more difficult. These same contentions were made before the Commission and rejected, but the Commission recognized the fact that "personal benefit * * * is derived from the operation of stations" and exempted only operations on a "non-profit" basis. These contentions go to the policy judgment of the Commission, and we have not been shown that this ruling was arbitrary.

The Commission, in response to a challenge by intervenor American Trucking Associations, submitted the affidavit of its chief budget officer with its brief.[13] The affi-

[13] The Associations complain that this affidavit was "new material" not considered by the Commission in setting the schedule. However, in its brief the Associations stated: "If the Commission had any evidence for its conclusion that '* * * the total fees to be collected bear a fair relationship to the cost of administering the Safety and Special Radio Services,' it has not supplied it." (Brief of Intervenor American Trucking Associations, Inc., at p. 19). The Commission accepted this implied invitation.

davit showed that in all categories the fees to be collected would be less than the cost of administering the particular service. The associations, in reply, accept this conclusion but urge that since the affidavit shows recovery by fees of 8% of the cost of administering the Broadcast Services, and 72% of the cost of administering the Safety and Special Radio Services, there is "a disproportion" which per se is "sufficient evidence of arbitrariness to justify * * * setting aside the Commission's decision." The self-sustaining principle is but one of the factors to be considered by the Commission in distributing the burden of costs, and there is no necessity that it be given the same weight in setting each class of fees. And the Associations' arguments comparing percentage of costs recovered are unimpressive considering the minimal fees to be paid by each individual member.

Finally we do not agree with intervenor American Radio Relay League that the imposition of fees upon amateur radio service is not within the authority of § 140 because many amateurs are engaged in "the official business of the Government" because some public service is rendered, and because an amateur radio license has no "value to the recipient." The Commission took the commendable public service into consideration in setting the nominal fee[14] and exempting novices and those amateurs who participate voluntarily in emergency communications networks. It also considered the possibility that a greater fee might discourage the use of radio by amateurs, and set the fee at a minimum so as not to interfere with the purpose of the Communications Act[15] to encourage and enlarge the

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[14] For initial licenses and renewals, for five years, the fee is $4.00—for a modification of an amateur license, $2.00. A $20.00 fee is charged for special amateur call signs.

[15] 47 U.S.C. § 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest."

use of radio by amateurs in the public interest. And we see no requirement in § 140 that "value to the recipient" need be pecuniary value. That is but one of the factors that the Commission had to take into account, and as we have indicated before, the Commission may in its discretion determine what weight should be placed on each of the factors.

We affirm the Commission's order since we think no showing has been made that § 140 is unconstitutional or that the Commission's action was arbitrary or lacking authority, or that the Commission exceeded its authority or disregarded guidelines.

Petition to set aside order DENIED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
1212 LAKE SHORE DRIVE
CHICAGO 10, ILLINOIS

KENNETH F. CARRICK
Clerk

August 5, 1964

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Re: Aeronautical Radio, Inc., et al. v. United States of America and Federal Communications Commission, No. 14419

Gentlemen:

Enclosed is certified copy of the final decree entered August 5, 1964, in the above entitled cause.

Very truly yours,

KENNETH J. CARRICK,
Kenneth J. Carrick,
Clerk

KJC:hm
Enc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14,419

AERONAUTICAL RADIO, INC., et al., *Petitioners,*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Petition for Review of an Order of the Federal Communications Commission

Aug. 5, 1964

Decree

This cause came on to be heard on the joint petition to review and set aside an order of the Federal Communications Commission, and the transcript of the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ORDERED, ADJUDGED, and DECREED that the orders of the Federal Communications Commission released on May 8, 1963 and October 7, 1963, in Docket No. 14507, adopting a schedule of fees be, and the same are hereby AFFIRMED, and that the joint petition to set aside the said orders be, and the same is hereby DENIED, in accordance with the opinion of this Court filed July 10, 1964.

It is further ORDERED, ADJUDGED, and DECREED that the conditions imposed by this Court on February 13, 1964, upon the collection of monies by the Federal Communications Commission *pendente lite* are hereby terminated, and that all fees collected *pendente lite*, and heretofore held in the United States Treasury Deposit Fund Account 27X6725 ("Fees Subject To Possible Refund Pursuant To Court Order, Federal Communications Commission"), may be

paid into the Miscellaneous Receipts of the United States Treasury.

/s/ ELMER J. SCHNACKENBERG
United States Circuit Judge

/s/ ROGER J. KILEY
United States Circuit Judge

/s/ LUTHER M. SWYGERT
United States Circuit Judge

A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

1. Legislative Background of Agency Fee Proposals

Proposals to authorize FCC filing fees go back as far as the Radio Act of 1927. A 1930 proposal to amend the Act to give the FCC specific authority to impose filing fees estimated to yield $700,000 was reported out by the Senate Committee, but failed of enactment. See S. Rep. No. 1467, 84th Cong., 2d Sess., p. 16 (1956). Thereafter, periodic proposals for FCC charges were consistently rejected by Congress (or the appropriate legislative Committee). See Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives on H.R. 3880, 82nd Cong., 1st Sess., 524 (1951). See also R. 80-81.

Aside from these specific FCC proposals, divergent Congressional views obtained on the general problem of agency charges. On July 24, 1950, the Senate Committee on Gov-

ernment Operations (then the Committee on Expenditures in the Executive Department), based on a study of 12 selected agencies, including the FCC, concluded that the problem was far too broad to be covered by general provisions and that, if practical results were to be obtained, remedial action should be taken by individual acts of Congress drafted by the appropriate jurisdictional Committees of Congress, who were specialists in their respective fields. S. Rep. 2120, 81st Cong., 2nd Sess. (1950).

Shortly after the Committee on Government Operations made this recommendation, however, the House Appropriations Committee began hearings on H.R. 3880, 82nd Cong., 1st Sess., the Independent Offices Appropriation Act of 1952. No non-government witnesses testified before the Appropriations Committee with respect to agency charges. Despite the recommendation of the Government Operations Committee's more comprehensive study that only *individual* acts of Congress could adequately deal with the fee problem, the Appropriations Committee added to the 1951 Appropriation Act the legislative rider which has become Section 140.[1] The House Report on the bill expressed concern "that the Government is not receiving full return from many of the *services which it renders to special beneficiaries*" but also stated that the bill was not intended to "conflict with studies now underway" on the fee problem. H.R. Rep. 384, 82nd Cong., 1st Sess., pp. 2-3 (1951). On the floor of the House, Section 140's sponsor, Congressman Yates, used FCC broadcasting licenses as an example of such "special beneficiaries," and asserted that "it is only fair that in exchange for the franchise that the Government gives" broadcasters, they "should pay some of the costs of the hearings" generated by their licensing

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[1] In 1951, as today, Congress operated under rules purporting to outlaw such legislative riders on appropriation bills. House of Representatives Rule XXI, Section 2; Legislative Reorganization Act of 1946, Public Law 601, 60 Stat. 812, § 103(2) (1946); See Appendix C, Pt. 3, *infra*.

proceedings. 97 Cong. Rec. 4809 (May 3, 1951). With virtually no further debate on Section 140, the appropriation bill passed both houses of Congress.[2]

The most comprehensive study of the general subject of agency fees is contained in S. Rep. 1467, 84th Cong., 2nd Sess. (1956), "Fees for Government Services," a 250-page report of Government wide practices and comments on the 1951 rider prepared pursuant to S. Rep. 140, 84th Cong. (1955). This authoritative report by the Senate Committee on Government Operations concluded that any legislation on charges, even for "private benefit" services, should be considered each agency's respective jurisdictional committees. S. Rep. 1467 also reveals that none of the agencies of government, other than the FCC, contemplated the imposition of any comprehensive system of charges for regulatory functions, notwithstanding the efforts of the Bureau of the Budget in its Circular A-25 (November 5, 1953), reissued Bureau of the Budget Circular A-25 (September 23, 1959).

The following Congressional materials are relevant to an understanding of the conflicting and unresolved legislative viewpoints regarding the agency fee problem in general and FCC filing fees in particular:

S. Rep. 2120, 81st Cong., 2nd Sess. (1950)
Hearings on H.R. 3880, 82nd Cong., 1st Sess. (1951)
H.R. Rep. 384, 82nd Cong., 1st Sess. (1951)
Hearings on S. 2926, 83rd Cong., 2nd Sess. (1954)
S. Rep. 1467, 84th Cong., 2nd Sess. (1956)
Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce on H.R. 6627 (March 4, 1964) (testimony of FCC Chairman Henry).

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[2] Notably, Mr. Yates was wholly in error in calling a "radio license" a "franchise." See Federal Communications Act, 47 U.S.C. §§ 304, 307(d).

2. FCC Proceedings

The FCC's first attempt to impose fees under Section 140[3] was suspended pursuant to a resolution by the Senate Interstate and Foreign Commerce Committee. See S. Rep. 1467, 84th Cong., 2nd Sess., p. 10 (1956). The Chairman of the Committee explained that "the committee feels that the Congress should set up the *basic standards for each agency to follow* in imposing charges for licenses." 100 Cong. Rec. 4936 (April 9, 1954).

During the nearly eight years this first FCC fee proceeding lay dormant, Congress enacted no further legislation clarifying the standards for the FCC or any other similar agency to follow in setting fees and charges. Nevertheless, in February, 1962, the FCC, by a 4-3 vote, issued its Notice of Proposed Rule Making in Docket 14[illegible], proposing the schedule of fees and charges which is the subject of the instant proceeding.

The FCC invited written comments on its fee proposals, but did not permit oral argument or hold a hearing, although requested to do so (R. 66). Of the written comments, "the vast majority were in opposition to the proposed schedule of fees." (R. 142). On May 8, 1963, the FCC, Commissioners Bartley and Ford dissenting, issued its Report and Order imposing the fee schedule (R. 140-172).

Although the FCC majority's Report and Order of May 8, 1963 (R. 140-169) and its subsequent Memorandum

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[3] See Notice of Proposed Rule Making, Docket 10869, January 28, 1954. Later in 1954, a unanimous FCC told its jurisdictional Senate Committee that "... the Commission has expressed the view that its licensing activities are part of its regulatory function which is performed for the benefit of the public rather than for the benefit of any 'special interest groups.' ... the Commission has felt that the cost of its licensing activity, like the cost of its other regulatory functions, should be borne by the general public." Hearings before a Subcommittee on Interstate and Foreign Commerce on S. 2926, 83rd Cong., 2nd Sess., p. 17 (1954) (See R. 74).

Opinion and Order of October 7, 1963 (R. 202-225) lessened or eliminated a few of the fees originally proposed, all arguments against the principle of fees were summarily rejected (e.g., R. 142-145, 205).

With respect to the specific fees, the FCC majority asserted that it was not "administratively feasible" to adjust fees to reflect "value to the recipient" of a particular license (R. 149) and that costs were difficult to allocate (R. 150). Accordingly, it decided to impose flat fees on applicants within each of the three broad classes of services (Broadcast, Safety & Special, and Common Carrier) which it regulates, on the grounds that such flat fees could be "readily collected without great inconvenience" (R. 150). Although the FCC majority made several general references to the "cost" of broad classes of service (e.g. R. 141, 150, 152, 155, 158, 159-160, 162), it failed to include in either of its opinions or in the record on which they are based any findings or evidence as to what these costs actually were, or any showing of the actual share of applicable costs to be borne by each class of applicants. Moreover, despite Section 140's apparent direction to consider the "public policy, or interest served" by any government service for which a fee was proposed, the majority asserted that it failed "to ascertain how any significance may be attributed" to the difference between "regulatory" and "special benefit" services "in light of the specific language" of Section 140 (R. 205).[4]

FCC Chairman Henry's later testimony before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 6697 (March 4, 1964), sheds further light on the FCC's decision making process in Docket 14507. The FCC Chairman admitted that fees to be charged Safety and Special Service applicants will "come

[4] The "specific language" on which the FCC relies simply "spells out 'service,' 'license,' and 'permit' as categories for which Congress considered fees to be appropriate" (R. 205).

up to 75% of the costs of that bureau now." (Tr. 57).[5] By contrast, he estimated that broadcast fees "perhaps in excess of a thousand dollars" (or more than *ten* times the present fees) would be necessary to recover the costs of regulating broadcasters (ibid.). Indeed, he admitted, it was never even proposed that broadcast fees be designed to recover the same high percentage of costs as Safety & Special Service fees because "we just felt like it was inappropriate to make them that high as an application fee rather than a revenue measure." (ibid.). Moreover, the broadcast fees in Docket 14507's Notice of Proposed Rule Making were cut more than 50% "in order to get the votes of some Commissioners." (Tr. 50).

3. Legislative Materials Concerning Appropriations Riders

Responsible forces in Congress have long deplored legislative riders on appropriations bills. Thus, after extensive study, the Joint Committee on the Organization of the Congress reported:

> "Our committee was created in response to a widespread congressional and public belief that a grave constitutional crises exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress. The course of events has created a breach between government and the people . . . [G]overnment by administration is the object of group pressures which weaken its protection of the public interest. Under these conditions, it was believed, the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures." (S. Rep. 1011, 79th Cong., 2d Sess. 1 (1946)).

On the specific subject of legislative riders to appropriation bills the Joint Committee recommended:

> "That the practice of attaching legislation to appropriation bills be discontinued; that the rules be tight-

[5] Citations are to original hearing transcript.

ened to prevent under the parliamentary guise of 'economy limitations' amendments which are, in fact, designed to effect legislative changes.

"The practice of attaching legislation to appropriation bills is often destructive of orderly procedures. Riders obstruct and retard the consideration of supply bills. Sometimes they contradict action previously approved in carefully considered legislation.

"In most cases such legislation is adopted under the parliamentary guise of 'limiting provisos' avoiding points of order that would be raised against them by purporting to restrict the spending of Government funds. These practices, when used for purposes other than to effect real economies, should be prohibited by a tightening of the rules." (Id. at 23).

Accordingly, the Legislative Reorganization Act of 1946, 60 Stat. 812 (1946), setting out the Rules of the Senate, provides in pertinent part:

> "The Committee on appropriations shall not report an appropriation bill containing amendments proposing new or general legislation. . . ." (Section 103 (2)).

In introducing the reorganization bill in the Senate, its sponsor, Senator LaFollette stated flatly, "we propose the outlawing of legislative riders on appropriation bills." (92 Cong. Rec. 6345 (1946)).

Similarly, Section 2 of Rule XXI of the House of Representatives provides in part:

> "Nor shall any provision in any such [appropriation] bill or amendment thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill. . . ."

Above and beyond the reasons for outlawing appropriations riders documented by S. Rep. 1011, *supra*, Senator Johnson's remarks concerning Section 140 itself are pertinent. "I did not know that there was even such a provision until several months after it was enacted. We do not look for legislation in appropriation bills, and so the matter is easily overlooked." Hearings on S. 2926, 83rd Cong., 2d Sess., p. 14 (1954).

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–12a) is reported at 335 F. 2d 304. The Commission's report and order (R. 140–172)[1] is reported at 34 F.C.C. 811, and its memorandum opinion and order denying rehearing (R. 202–225) is reported at 28 Fed. Reg. 10911.

[1] "R. ——" references are to "Petitioners' Appendix" in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. 13a-15a) was entered on August 5, 1964, and the petition for certiorari was filed on October 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title V of the Independent Offices Appropriation Act of 1952, which authorizes federal agencies to prescribe, for services performed and privileges granted, "fair and equitable" fees "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts", is a valid delegation of authority.

2. Whether the schedule of filing fees adopted by the Federal Communications Commission constituted a reasonable implementation of that Act.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 5 U.S.C. 140, is set forth in the petition for certiorari, pp. 3–4.

STATEMENT

The petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit upholding the legality of a schedule of filing fees adopted by the Federal Communications Commission for applications for licenses, certificates and per-

mits which it issues. Petitioners are all either FCC licensees or associations whose members are FCC licensees. The background facts are as follows:

Title V of the Independent Offices Appropriation Act of 1952, 5 U.S.C. 140, authorizes all federal agencies to establish, through appropriate regulations, a system of fair and equitable fees for "any * * * service, * * * privilege, * * * license, * * * or similar thing of value * * * granted * * * or issued" by such agencies to or for any person, except those engaged in the transaction of official business for the government. The statute provides that any fees charged shall be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *." The expressed purpose of the Act was to permit federal agencies to appraise their operations and devise a schedule of fees which would make "self-sustaining to the full extent possible" many of the services they render. As the House Report on the Act makes clear, Congress was "concerned that the Government [was] not receiving full return from many of the services which it renders to special beneficiaries." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2.

On February 16, 1962, the Commission released a notice of proposed rulemaking (Docket No. 14507, 27 Fed. Reg. 1729) setting out a proposed schedule of fees for its licensing and regulatory functions and inviting

public comments (R. 3–7).[2] The proposed fee schedule was broken down into three basic categories reflecting the major areas of Commission regulatory activity: broadcasting, common carrier, and safety and special radio services (*i.e.*, amateur, aviation, marine, fire, police, etc.) (see R. 148, 151, 155).[3a] Some 900 formal comments and over 500 letters were submitted to the Commission in response to the rulemaking notice (R. 142). As a result of these comments, some changes were made in the amounts specified in the original fee schedule, and a number of services were exempted entirely (see R. 150–151, 153–154). For example, in response to arguments that high fees might discourage the growth of FM radio stations and UHF television stations (see R. 150–151), those charges were reduced, respectively, from $150 to $50 and from $250 to $100 (compare R. 5 with R. 166). And organizations such as hospitals, which "use radio essentially for public safety purposes", were exempted (R. 153).[4]

The Commission found that establishment of a fee schedule was in the public interest in its administration of the Communications Act of 1934, noting that the Securities and Exchange Commission, the Immi-

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[2] An earlier proceeding (Docket No. 10869) proposing a schedule of fees had been instituted by the Commission on January 27, 1954. That proceeding was terminated in 1963 when the Commission instituted Docket No. 14507. (R. 143, n. 2.).

[3a] The proposed fees ranged from $100 for a television station to as low as $2 for modification of an amateur's license (R. 219–294).

[4] Later, in response to petitions for reconsideration, the Commission further modified the schedule to take account of other special circumstances (see, *e.g.*, R. 206–209).

gration and Naturalization Service, the Department of Defense, and the Federal Aviation Agency had made similar judgments in establishing charges for some of their services under Section 140 (R. 145); and it rejected various contentions that it did not have authority to act (R. 143–144). The schedule, as amended, was made effective as of January 1, 1964 (R. 163–164).

Petitioners appealed the Commission's order to the Seventh Circuit, which unanimously affirmed it (Pet. 1a–12a). The court of appeals held that the statute was a constitutional delegation of authority fully comporting with the standards laid down by this Court in *Yakus* v. *United States*, 321 U.S. 414, since the congressional objective was plain, the method of achievement was prescribed, and the guiding standards were adequate (Pet. 3a–4a). The court also rejected the contention that because the statute was enacted as part of an appropriation measure it contravened the Legislative Reorganization Act of 1946, 60 Stat. 812, 821, and the rules of the House and Senate. Finally, the court reviewed the record and found that in establishing fees the Commission had taken into consideration the standards specified in the statute and had not abused its discretion with regard to the weight assigned to each (Pet. 8a–12a).

ARGUMENT

The petition raises no substantial question warranting review by this Court. Delegations of authority of the kind employed by 5 U.S.C. 140 have uniformly been held constitutional, and it is settled that enact-

ment of a substantive law as part of an appropriation bill does not impair its validity. Petitioners' other contentions regarding the manner in which the Commission exercised its discretion under the statute were properly rejected by the court below.

1. The governing standard specified by Congress, that the fees be "fair and equitable", taken together with the directive that the agency consider, among other things, "cost to the Government, value to the recipient [and the] public policy or interest served", is, as the court below held, a statement of "Congressional ground rules * * * clear enough to limit the Commission" without being "too narrow to embrace all federal agencies" (Pet. 4a). The statute falls well within constitutional limits. This Court has recognized that in many situations "[t]he details on which fair judgment must be based are too shifting and judgment upon them calls for too specialized understanding to make direct congressional determination feasible." *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 610. In such situations, broad delegations to governmental agencies are sustained unless "there is an absence of standards for the guidance of the [agency's] action so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed * * *." *Yakus* v. *United States*, 321 U.S. 414, 426.

Applying this principle, this Court has upheld, for example, the standards of "fair and equitable" commodity prices, *Yakus* v. *United States*, *supra*; "fair, efficient and equitable distribution" of sugar allot-

ments, *Central Roig, supra;* "reasonable" coal prices, *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381; and the granting of radio licenses in the "public convenience, interest, or necessity", *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.[4] Those decisions are dispositive of this case.[5]

2. There is no merit in the argument that Section 140 is invalid because enacted as a rider to an appropriation bill (Pet. 9–11). The authority of Congress to pass substantive legislation in appropriation acts is clear. *United States* v. *Dickerson,* 310 U.S. 554. Petitioners argue that *Dickerson* should be reconsidered (or distinguished) in view of the subsequent enactment of the Legislative Reorganization Act of 1946, 60 Stat. 812, which adopted as a Senate rule a prohibition against amending appropriation bills by

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[4] In asserting that Section 140 is "unprecedented" in the degree to which it delegates authority (Pet. 6–7), petitioners also overlook 28 U.S.C. 1911 (authorizing this Court to "fix the fees to be charged by its clerk") and 28 U.S.C. 1913 (providing that "[t]he fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States").

[5] Petitioners contend that, in testing the adequacy of the legislative delegation of authority in Section 140, the court below should have combined and considered as a single element not only the asserted inadequacies of the statute itself but also the alleged abuses committed thereunder by the Commission (Pet. 6–8). This argument erroneously implies that a valid delegation of authority may be rendered unconstitutional if the discretion it bestows is abused in practice. Petitioners cite no case so holding, and we think it plain that the constitutional adequacy of the statute and the propriety of the Commission's actions were properly treated as separate questions by the court of appeals.

attaching new or general legislation to them (Pet. 10–11, nn. 9, 10). But the short answer to petitioners' contention is that Section 140 was not an amendment. It was an integral part of the 1952 Appropriation Act from the time it was reported to the House from the Committee on Appropriations. See H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3.

Moreover, it is clear that the provision against adding general amendments to appropriation bills was intended solely as a rule to guide the Senate, since it was specifically made subject to the further rule-making power of the Senate acting alone (Section 101(b) of the Reorganization Act, 60 Stat. 814). Like the similar House rule, it established a procedure whereby an amendment proposing new or general legislation, when appended to an appropriation bill, shall be subject to a point of order "and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations" (Section 103(2)). No statute or rule purports to nullify substantive legislation adopted in appropriation bills.

3. While it is true that some would deem it wiser for Congress to consider the question of agency fees on an *ad hoc* basis, this is clearly a matter for legislative judgment. The Report of the House Committee on Appropriations recognized that other committees of Congress were considering the problem and that further legislation might result. Enactment of Section 140, the report stated, "would in no way conflict" with those studies. H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3. In the meantime, as the

Seventh Circuit held, Section 140 remains the law.

4. Petitioners' final challenge is to the reasonableness of the fee schedule itself (Pet. 11–14). All of the matters raised were carefully considered by the court below (Pet. 6a–12a), which correctly held that "[t]he weighing of these statutory factors or 'whether all * * * must play a quantitative share' in the judgment made, was for the Commission" acting in its discretion (Pet. 8a).* See *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 611. The court concluded that this discretion had not been abused because, among other reasons, "the care displayed [by the Commission] in adjusting fees, after comments and objections from licensees, * * * compels the conclusion that there is no merit to petitioners' claims" (Pet. 10a). That determination rests on a fair assessment of the record, a function "which Congress has placed in the keeping of the Courts of Appeals", and further review by this Court is therefore unwarranted. *See Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400–401.

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* See, *e.g.*, the Seventh Circuit's discussion of the comparative treatment of applications for broadcast licenses and those for safety and special services (Pet. 9a–11a), again argued in the petition, pp. 12–13. Petitioners (pp. 7, 11) also urge that the Commission improperly levied fees on applications rather than on license grants. The court below correctly held that this issue was foreclosed by petitioners' failure to raise it before the agency (Pet. 8a). In any event, the processing of applications is plainly "work, service * * * or similar thing of value * * * performed" for an applicant within the meaning of 5 U.S.C. 140, warranting imposition of fees.

CONCLUSION

The decision below is clearly correct and poses no new or important issue of law. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Solicitor General's brief in opposition to the petition for certiorari, like the opinion of the court below, glosses over the real import of this case which clearly presents unique and substantial issues warranting review by this Court.

The brief ignores Section 140's unprecedented status as a delegation of revenue raising authority to all

unnamed government agencies.[1] It overlooks the fact that, of the hundreds of government agencies potentially subject to Section 140, the FCC is the first and only one to adopt a comprehensive schedule of fees under Section 140's claimed authority.[2] And it totally fails to come to grips with the basic problem of how the FCC's action—and all future agency revenue raising actions—may be effectively checked or controlled in light of Section 140's vague standards as implemented by the FCC and ratified by the Court of Appeals.

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[1] Contrary to the brief in opposition (p. 7, n. 4), statutes authorizing courts to fix and collect fees furnish no analogy to Section 140. In sharp contrast to Section 140's blanket delegation, the statutes cited by the Solicitor General are *specific* delegations by duly considered legislation to specific bodies to fix and collect docketing fees for specific functions with which Congress was fully versed. Indeed, Congress itself specifically designated the amount of certain fees to be collected by District Courts. 28 U.S.C. §§ 1914, 1923. Actually, in light of this country's common law background, *no* statutory authority may be required to enable *courts* to collect filing fees. In any event, Congress at no time has ever broadly directed the Judiciary to make itself "self-sustaining" through filing fees.

[2] There is no basis for innuendo (Br. pp. 4-5) that the FCC followed the lead of the SEC, Immigration and Naturalization Service, Department of Defense, or FAA, in establishing its charges. The FAA charges (14 C.F.R. § 187) are for furnishing copies of documents. The Department of Defense regulations (32 C.F.R. § 288) impose charges principally for furnishing documents, copies, or searching. The Immigration and Naturalization Service fees (8 C.F.R. § 103.7(c)) merely supplement various filing fees already authorized by statute. 8 U.S.C. § 1351. In the absence of any citation, either in the record or in the brief in opposition, it is not clear what SEC fees the FCC may have claimed to rely on. Filing fees for registration statements are *specifically provided for by statute*, 15 U.S.C. § 77f, and the applicable regulation, 17 C.F.R. § 230.457, simply provides a method for calculating the statutorily prescribed fee.

Above all, the brief in opposition overlooks the synergistic effect of the multiple delinquencies in the Congressional and agency law-making base for this revenue raising impost.

The brief in opposition (p. 5) notwithstanding, "delegations of authority of the kind employed by 5 U.S.C. 140" have *not* "uniformly been held constitutional" for the simple reason that *no* such blanket delegation of revenue raising authority, which unnamed government agencies may exercise or not as they choose, has ever been attempted. Without exception, the cases cited in the Solicitor General's brief (pp. 6-7)[3] involved delegations to *specific* high level administrators to make decisions based on stated criteria in *particular designated fields*. Indeed, this court has suggested that proper performance of the "legislative function" *requires* that *Congress* specify "the basic conclusions of fact upon ascertainment of which, from relevant data by a *designated administrative agency*, it *ordains that its statutory command is to be effective.*" *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 145 (1941) (emphasis added).

Moreover, no previous delegation approved by this court was enacted as a legislative rider on an appropriations bill.[4] Passage of legislation in this fashion ren-

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[3] *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604 (1950); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[4] House of Representatives Rule XXI, § 2, provides that no "*provision in* any such [appropriations] bill or amendment thereto changing existing law" shall be in order (See Pet. p. 21a), refuting any suggestion (Br. p. 8) that § 140's passage was proper because the Independent Offices Appropriations Act of 1952, like any other appropriations bill, originated in the House, rather than the Senate.

ders any talk of Congressional intent a farce, and frustrates any search for legislative background to give meaning to Section 140's vague standards.[5]

Finally, the Court of Appeals' approval of the FCC's action simply confirms in the FCC—and in any other federal agency—the uncontrolled discretion to impose charges of whatever amount for whatever purpose subject to no effective control by any of the three major branches of government. For if, as the brief in opposition suggests (p. 9), the FCC's juggling of the amounts of fees, its belatedly presented "cost study," and its arbitrary inclusions and exemptions from its fee schedule[6] satisfy traditional principles governing administrative action pursuant to delegated authority, this can only occur because Section 140 itself is so vague that it means whatever an agency chooses to make it mean in any particular case.

In short, where, as here, the phrase, "fair and equitable" is asserted to encompass within its range of reasonableness fees recovering as little as 8% and as

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[5] Cf. *Lichter* v. *United States*, 334 U.S. 742, 783-87 (1948) (Congress' "well considered judgment" against specific factual background validates Renegotiation Act). In *this* case, however, even the sponsor of § 140 was apparently confused as to the "factual background," and, in any event, the FCC's action here has totally failed to accomplish *his* stated purpose to compel broadcasters to "pay some of the costs of the hearings" generated by their licensing proceedings. See Pet. pp. 16a-17a.

[6] To use an example from the brief in opposition, "organizations such as hospitals, which 'use radio essentially for public safety purposes', were exempted" (Br. p. 4). Yet at no time has the FCC adequately explained its simultaneous decision not to exempt stations in the aviation service governed by 47 C.F.R. § 87.123 which restricts their transmissions to "communications for the safe, expeditious, and economical operation of aircraft and the protection of life and property in the air. . . ."

high as 72% of applicable costs from contemporaneous applicants, this claimed Congressional standard (Br. p. 6) consists only of empty words, without meaning in evaluating this or any other future agency revenue raising action.

The essential point of this case is simply this: to allow the present FCC fee schedule to stand on the claimed authority of the 1951 rider and the Court of Appeals' permissive and broad opinion will be the first and irreversible step toward a significant departure in our system of government. Whether the Constitution permits uncheckable agency revenue raising action, based on a Congressional pronouncement of questionable origin, unprecedented scope, and uncertain content, is a substantial question, warranting full and deliberate review by this Court.

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